

**LAW5015 –
PRINCIPLES OF ETHICS IN
LEGAL PRACTICE**

**CHECKLIST
STREAM 1**

T3 2017

APPROACHES TO ETHICS

Step 1: State the position at law

- This situation the law per ACS says...
- Apply the legal rule to the scenario

Step 2: Go through each ethical approach in light of the law.

- What would an adversarial advocate do? Etc.
- What would a general moral approach do?
 - Kantian
 - Consequentialism
 - Virtue Ethics

Step 3: Conclude on your approach and whether you agree with the position at law

Lawyer's Approaches to Ethics

Model	Do general ethics apply to lawyers?	Objective
Adversarial Advocate	No. Role defined by adversary framework	Advocate client's interests as zealously as possible with barest obligation to legality
Responsible Lawyer	No. Role defined by spirit of the law	Make law work as fairly and justly as possible
Moral Activist	Yes. Social theories of justice are important for lawyers	Advance justice through: (i) Public interest lawyering and law reform activities; (ii) Client counseling to seek to persuade clients; or withdraw
Ethics of Care	Yes. Character, virtue and relational ethics are important for both lawyers and clients	Both lawyer and client to preserve relationships and avoid harm

Adversarial/Zealous Advocate

- Considers their duty to advance their client's interests with the maximum zeal permitted by the law (barest obligation to legality)
 - This is the predominate view of lawyers' ethics as it accords with the adversarial nature of our system
- Suppression of own individual moral opinions and consideration of general ethical concerns as a moral act in itself
- **Partisanship:** The lawyer should do all for the client that the client would do for themselves, if the client had the knowledge of the lawyer
- Underlying theory: everyone entitled to representation, not up to lawyer to make moral judgment
 - The lawyer is not morally responsible for either the means or the ends of representation, provided both are lawful
- The law requires lawyers to assist their clients to do anything that they are lawfully entitled to do
- Lawyers ought not worry if something seems 'immoral' as long as they stay inside the law i.e. within the range of their client's legal entitlement

Pros	Cons
<ul style="list-style-type: none"> • Everyone entitled to representation; especially relevant when someone is vulnerable (e.g. criminal case against resources of state) • Provides a simple and clear rule 	<ul style="list-style-type: none"> • Not a fair contest in reality – imbalances of power is a result of the market function - wealthy can buy the best representation; • Can raise costs and lengths of litigation • May be unnecessary outside criminal law • Subsumes other ethical responsibilities

Responsible Lawyering

- The responsible lawyer considers themselves an officer of the Court and guardian of the legal system who aims to comply with the spirit of the law
 - Argues that lawyers' ethics are governed by the role of facilitating justice according to law
- Lawyer is responsible to make law as fair and just as possible
- Issues not decided on purely procedural or formal grounds but substantive merits
- They advocate for clients' interests, but will not breach ethical rules that could damage the profession

CRIMINAL MATTERS

It is noted that [L] as a criminal law advocate is bound by the same duties as all other advocates (Giannarelli; rr 17-29 ASCR; rr 8-10 BR)

Rights of the Accused

- **S 24 Charter:** Fair hearing
- **S 25 Charter:** Rights in criminal proceedings
 - Presumed innocent until proven guilty
 - Right to a fair trial and legal assistance (was not given in *Dietrich*)
- **S 25(2)(k) Charter:** Right to put prosecution to the proof and not be compelled to confess guilt
 - **ASCR 20.2, BCR 80:** Practitioner must not falsely suggest that some other person committed the offence (*Tuckiar*)

General duties to the court

- Candour - not to mislead the court as to the law or facts
 - Hid true intentions (to plead guilty) to the court just for his client (*LSC v Cantwell*)
- To exercise independent judgment
- To assist the court and conduct cases efficiently and expeditiously
- Not to misuse privileges, and
- Duties relating to witnesses

General Duties Relating to Witnesses

- Practitioners must not:
 - **ASCR 23, BCR 74:** Prevent or discourage a prospective witness from conferring with an opponent
 - **ASCR 24.1, BCR 69:** Advise or suggest to a witness that they give false or misleading evidence, or coach a witness on what answers to give
 - **ASCR 25.1, BCR 71:** Confer with more than one lay witness (including a party or client) at the same time about a contentious issue where it could affect the evidence to be given
 - **ASCR 26, BCR 73:** Confer with a witness (including a party or client) while they remain under cross-examination, except:
 - With the consent of the cross-examiner, or
 - Where special circumstances (including the need for instructions on a compromise) require it and the cross-examiner is informed as soon as possible

Practitioners as Witnesses

- **ASCR 27:** A solicitor must not appear as advocate in a case in which they will be required to give material evidence on contested issues, but they may continue to act for the client unless it would prejudice the administration of justice
- **BCR 101(d):** A barrister must not accept a brief to appear before a court if there is a real possibility they may be a witness in the case

COSTS

To be valid, the costs agreement must comply with Uniform Law: ss 180-183, 185

Legal Costs Must be Fair and Reasonable

- Costs must be fair and reasonable (s 172(1) LPUL), including:
 - (a) Proportionate and reasonable to work incurred, and
 - (b) Reasonable in amount
- In determining this look to whether the legal costs reasonably reflect (s 172(2) LPUL):
 - The level of skill, experience, specialisation and seniority of the lawyers concerned; and
 - The level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
 - The labour and responsibility involved; and
 - The circumstances in acting on the matter, incl. any or all of the following—
 - (i) The urgency of the matter;
 - (ii) The time spent on the matter;
 - (iii) The time when business was transacted in the matter;
 - (iv) The place where business was transacted in the matter;
 - (v) The number and importance of any documents involved; and
 - The quality of the work done; and
 - The retainer & instructions (express or implied) given in the matter
- S 173 LPUL: LP must not act in a way that unnecessarily results in increased legal costs payable by a client, and must act reasonably to avoid unnecessary delay causing increased legal costs
- S 24 CPA: OO to ensure costs are reasonable and appropriate
 - Lawyers must use reasonable endeavours to ensure legal costs (& costs connected to them) are reasonable & proportionate to:
 - a) The complexity or importance of the issue; and
 - b) The amount in dispute

Retainers

- Lawyer should only accept instructions if they can act honestly, competently and within time
- L is not entitled to recover generally unless retainer completed
 - If L unjustifiably terminates → Disciplinary procedure

If not in the form of currency

- Eg. Shares, hamper, presents
- Can they form part of the costs agreement without a monetary value?
 - Uniform Law doesn't specify that it must be currency – but it speaks of 'payment' of costs
- Consider 'gifts' – undue influence (lawyer-client conflict)

*** Disclosure Requirements: s 174

- Only for more than \$3,000
- A LP must disclose (s 174(1)(a) LPUL):
 - How legal costs will be calculated and an estimate of the total legal costs AND
 - If there is a significant change:
 - L must provide the client with info disclosing the change
 - C can assess impact of change + make decisions re future conduct: s 174(2)(b) LPUL
- Must also disclose client's right to (s 174(2)(a) LPUL):
 - i. Negotiate a costs agreement with the law practice; and
 - ii. Negotiate the billing method (for example, by reference to timing or task); and
 - iii. Receive/request an itemised bill; and
 - iv. Seek the assistance of regulatory authority in the event of a dispute about legal costs;
- Must be in **writing**: s 174(6) LPUL

Exception: <\$3000

- LP need not make a disclosure if the total amount of legal costs will be less than \$3000: s 174(5) LPUL
- If costs are going to exceed the lower (s 174(7) LPUL) or higher (s 174(8) LPUL) threshold must:
 - a) Inform C in writing of expectation; and
 - b) Make disclosure required by ss (1) above

Client Consent

- LP must then take all reasonable steps to ensure client understands and consents to costs (s 172(3) LPUL)
- Obligation to Ensure Client Understands Disclosure (breached in *Smirnios*)
 - The client had limited proficiency in English

Other Requirements

- LP must disclose if they are retaining another firm on behalf of client: s 175 LPUL
- LP must make disclosure to 3P if that 3P is paying for C, only to extent necessary: s 176 LPUL
- **S 177(1) LPUL**: If settlement of litigious matter; must disclose to C before settlement is executed the reasonable estimate of costs that:
 - (a) The client will have to pay and
 - (b) The other party might contribute

→ *Contravention (next page)*